UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 08-12121-GAO

WILLIAM M. MCDERMOTT,
Plaintiff,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., U.S. BANK NATIONAL ASSOCIATION, and OCWEN LOAN SERVICING, LCC,
Defendants.

OPINION AND ORDER
May 11, 2009

O'TOOLE, D.J.

## I. Background

The plaintiff, William M. McDermott, filed suit in the Massachusetts Superior Court against defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), U.S. Bank National Association ("U.S. Bank"), and Ocwen Loan Services, LLC ("Ocwen"). The complaint, as subsequently amended, alleges that when McDermott obtained a loan from Aegis Lending Corporation ("Aegis") (which is not a defendant) secured by a mortgage on his home, Aegis did not provide him with certain booklets and disclosures required under federal and state law and otherwise made misleading and confusing disclosures to him. MERS was the nominee for the lender and the mortgagee named in McDermott's mortgage.[1] Ocwen became the servicer of the loan.

McDermott alleges that on September 17, 2008, the property was sold at foreclosure by MERS to itself as "allegedly the highest bidder." McDermott alleges that on that day, but prior to the

[1] MERS is an electronic registry to track mortgages and the changes in servicing rights and ownership of mortgage loans.

foreclosure sale, he filed his original complaint to rescind the mortgage in the state court, notified MERS' foreclosing attorneys of the rescission claim by certified and first class mail, as well as by fax, and also sent them a demand letter in compliance with Massachusetts General Laws chapter 93A, § 9. He further alleges that "[a]t or after the foreclosure sale, MERS allegedly assigned its bid and conveyed the property by foreclosure deed to U.S. National Association, as Indenture Trustee on behalf of the Noteholders of Aegis Asset Backed Securities Trust 2005-3, Mortgage-Backed Notes, 800 Nicollet Mall, Minneapolis, MN 55402 (a.k.a. U.S. Bank National Association)." (Verified Am./Supplemented Compl. ¶ 5 [hereinafter Am. Compl.].)

The amended complaint sets forth two counts, although Count I appears to include multiple claims. Count I is entitled "Rescission for TILA and CCDA violations," and states:

> The various disclosures and misleading and non-disclosures made relative to McDermott's loan constituted numerous violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601–2617 ("RESPA") and its implementing regulations, 24 C.F.R. 3500 (Regulation X), the federal Truth in Lending Act, 15 U.S.C. § 1633, et seq. ("TILA"), originally and as amended by the Home Ownership and Equity Protection Act, Pub. L. No. 103–325 (Sept. 23, 1994) (HOEPA) and its implementing regulations, 12 C.F.R. 226 (Regulation Z); the Massachusetts Consumer Credit Cost Disclosures Act, M.G. L. c. 140D ("CCCDA") and the Predatory Home Loan Practices Act, M.G.L. c. 183C and their implementing regulations at 209 CMR 32 and 40…."

(Am. Compl. ¶ 28.) The plaintiff seeks a judgment rescinding his loan, statutory and actual damages, costs, and attorney fees.

Count II alleges unfair and deceptive practices in violation of Massachusetts General Laws chapter 93A and similarly seeks rescission, costs, and attorneys fees, as well as treble damages.

The defendants removed the action to this Court on December 22, 2008 pursuant to 28 U.S.C. § 1441, asserting both federal question and diversity jurisdiction. U.S. Bank and MERS have

now moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, except for so much of Count I as seeks statutory damages under the CCCDA. Ocwen has moved to dismiss all claims against it.

## II. Count I

### A. Rescission Under TILA

TILA requires creditors to clearly and accurately disclose the material terms of consumer credit transactions to borrowers, see 15 U.S.C. §§ 1631, 1632, 1635, 1638, and provides for civil damages, among other things, when this is not done. See McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 421 (1st Cir. 2007); 15 U.S.C. § 1640(a). TILA also allows the borrower to rescind a loan for any reason within three days of the consummation of the loan or of the delivery of the required disclosures regarding rescission, whichever occurs later. See 15 U.S.C. § 1635(a). If the required disclosures are not provided, "the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." 12 C.F.R. § 226.23(a)(3); see 15 U.S.C. § 1635(f).

It is clear from the face of the amended complaint that McDermott's right to rescind under TILA expired prior the filing of his original complaint in state court on September 17, 2008, since the consummation of the loan occurred more than three years earlier, on April 11, 2005. (See Verified Am./Supplemented Compl. ¶¶ 3, 4, 20–24.) It is therefore unnecessary to consider the argument made by U.S. Bank and MERS that the claim for rescission under TILA must be dismissed because Massachusetts loans are exempt from TILA's rescission provision. See Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 19 (1st Cir. 2005) ("Although it is clear from the Federal Reserve regulations that a debtor's ability to bring a federal damages action under 15 U.S.C. § 1640 is preserved despite the

Massachusetts exemption, see 12 C.F.R. § 226.29(b), it is much murkier, given the current drafting of these regulations, whether a debtor's right to sue for rescission under federal law is preserved.").

B. Damages Under TILA

U.S. Bank and MERS argue that the plaintiff's claim for damages under TILA is time-barred, as it had to be brought within one year of the occurrence of the violation. See 15 U.S.C. § 1640(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."). McDermott makes no argument in opposition.

C. CCCDA – Rescission

Massachusetts General Laws chapter 140D, § 10(f) provides that "[a]n obligor's right of rescission shall expire four years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first…." U.S. Bank and MERS acknowledge that McDermott's complaint seeking rescission under the CCCDA was filed within the four year limitations period. However, they argue that the right to rescind expired when the property was sold at auction on September 17, 2008.

McDermott responds that he rescinded the mortgage prior to the foreclosure sale, as alleged in the amended complaint. (Am. Compl. ¶ 3–4.) Assuming the truth of that allegation, the right to rescind would have been exercised before it expired. The plaintiff has therefore sufficiently stated a claim for rescission under the CCCDA.

D. Ocwen

Ocwen argues that it is immune from claims under TILA and CCCDA because it was only the servicer of the loan. As already discussed, the TILA claims are untimely against any defendant. As for the CCCDA, that statute states, after providing for civil actions against an assignee of a creditor, that "[a] servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for the purposes of this section unless the servicer is or was the owner of the obligation." Mass. Gen. Laws ch. 140D, § 33(e). The amended complaint does not allege that Ocwen has any ownership interest in the loan, and McDermott has made no argument that Ocwen can be sued under the CCCDA.

E. RESPA

The defendants argue that the plaintiff's RESPA claim is time-barred. RESPA claims have either a three-year or a one-year statute of limitations, depending on the section violated. See 12 U.S.C. § 2614. Under either, the plaintiff's RESPA claim is not timely.

## III. Count II: Chapter 93A

A. Liability under Chapter 93A for violations of TILA, CCCDA, and RESPA

McDermott argues that regardless of whether the violations of TILA, CCCDA, and RESPA that he alleges are actionable directly under those statutes, those violations also constitute per se violations of chapter 93A, which has a four year statute of limitations. See Mass. Gen. Laws. ch. 260 § 5A. An act or practice is a violation of chapter 93A, § 2 if it "fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection," 940 C.M.R. 3.16(3), or if it "violates the Federal

Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal consumer protection statutes within the purview of M.G.L. c. 93A, § 2," 940 C.M.R. 3.16(4).

U.S. Bank and MERS argue that because they cannot be liable under the other statues, there is no basis for liability under chapter 93A, but they provide no authority to support this proposition. In any event, the claims for rescission and damages under the CCCDA remain in the case. McDermott has adequately pled a claim under chapter 93A against U.S. Bank and MERS.

B. Demand Letters

U.S. Bank further argues that it was not served with a demand letter, as required under chapter 93A, § 9. The complaint alleges only that a demand letter was sent to MERS' foreclosing attorneys, Harmon Laws Offices, P.C. McDermott argues that service of the chapter 93A letter on MERS's foreclosing attorneys was sufficient service on U.S. Bank because MERS was acting as its agent. Whether this is the case or not will depend on the development of the facts, and it cannot be concluded on the face of the complaint that U.S. Bank was not sent the required demand letter.

Ocwen also argues that it did not receive a demand letter. The plaintiff does not directly contest this assertion, but it does argue that Ocwen's response to McDermott's 93A demand letter violated RESPA because it failed to identify the holder of the mortgage, and attaches as an exhibit Ocwen's response to a September 17, 2008 letter. However, the complaint does not allege that a 93A demand letter was sent to Ocwen, and only alleges that it was served on MERS' foreclosing attorneys. No theory of agency has been advanced. The chapter 93A claim as to Ocwen is therefore dismissed.

C. Factual Allegations

U.S. Bank argues that the chapter 93A claim against it should be dismissed because McDermott does not allege that it did anything wrong. McDermott responds that U.S. Bank is an assignee of the note and therefore is liable under TILA and the CCCDA for rescission and for any violations which are apparent from the loan documents. See Mass. Gen. Laws ch. 140D, § 33(a) ("[A]ny civil action for a violation of this chapter, or any rule or regulation issued thereunder, or proceeding under section six which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purposes of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (I) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (ii) a disclosure which does not use the terms required to be used by this chapter, or any rule or regulation issued thereunder."); § 33(c) ("Any consumer who has the right to rescind a transaction under section ten may rescind the transaction as against any assignee of the obligation."). These allegations are sufficient to state a claim under chapter 93A.

## IV. Conclusion

The motions to dismiss (dkt. nos. 3, 5, and 7) are GRANTED in PART and DENIED in PART. They are granted as to the plaintiff's claims under TILA and RESPA as to all defendants, and as to the claims under the CCCDA and chapter 93A against Ocwen. They are otherwise denied.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge